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Supreme Court of the United States

OCTOBER TERM, 1937

No. 3

ERNEST K. JAMES, INDIVIDUALLY AND AS STATE TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA,
Appellant,

v.

THE DRAVO CONTRACTING COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

REPLY BRIEF FOR APPELLANT TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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TABLE OF CONTENTS

	Page
FOREWORD	1
ARGUMENT	2
I. The Government's Contention that the Taxes Do not Impose an Unconstitutional Burden on the Federal Government	2
II. The Government's Contention that the United States Has Exclusive Jurisdiction over a Part of the Area in West Virginia	2
CONCLUSION	14

CASES CITED

	Page
Atkinson *v.* State Tax Commissioner, (Ore. 1937) 67 P. (2d) 161	4, 7
Ft. Leavenworth R. R. Co. *v.* Lowe, 114 U. S. 525	4
Ohio River Contract Company *v.* Gordon, 244 U. S. 68	3, 7
Ralph Sollitt & Sons Construction Co. *v.* Virginia, (Va. 1934) 172 S. E. 290, 292 U. S. 599	3, 7
Surplus Trading Co. *v.* Cook, 281 U. S. 647	4

STATUTES CITED

PAGE

Constitution of the United States:

Art. I, Sec. 8, Clause 17 ---------- 4, 5, 6, 14

Acts of Congress:

41 Stat. 1063 (Approved June 10, 1920) ------ 5

46 Stat. 918, 928 (Act of July 3, 1930, Ch. 847, House Document 190, Seventieth Congress, First Session) ---------- 9

49 Stat. 1028, 1035 (Act of Aug. 30, 1935, Ch. 831, House Document 31, Seventy-Third Congress, First Session) ---------- 9

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FOREWORD

As indicated, the primary purpose of this brief is to reply to that filed for the United States as amicus curiae. Said brief of the Government supports the contentions of appellant relative to the two main propositions discussed therein except in one particular. For the sake of clarity and convenience, the views of the appellant relative to those of the Government will be discussed rather cate-

gorically, by referring to the particular principles advanced by the Government in its brief and to the pages thereof on which the subject matter is found.

ARGUMENT

I

THE GOVERNMENT'S CONTENTION THAT THE TAXES DO NOT IMPOSE AN UNCONSTITUTIONAL BURDEN ON THE FEDERAL GOVERNMENT.

This proposition, as stated by the Government in its brief, beginning on page 11 thereof, is, in effect, identical to the position taken by appellant in his briefs (Brief of Appellant, 28 and 45, Reply Brief of Appellant, 3-12). While appellant does not in any manner discount the force of the decisions cited in his briefs nor the argument advanced relative thereto, and relying thereon generally, it is believed and urged that the arguments advanced by the Government in its brief relative to this particular proposition are meritorious and sound, and appellant agrees with and concurs therein.

II

THE GOVERNMENT'S CONTENTION THAT THE UNITED STATES HAS EXCLUSIVE JURISDICTION OVER A PART OF THE AREA IN WEST VIRGINIA.

This proposition is stated on page 53 of the Government's Brief. Appellant is unable to agree with the Government in this position taken, nor is it believed that the authorities cited and the argument made in support thereof sustain said proposition. We readily agree with counsel for the Government, *as a general proposition,* that if the activities of appellee were performed on territory over which the State of West Virginia had no juris-

diction, that obviously there can be no tax assessed against appellee. We further agree with the Government in its statements contained on pages 54, 55, 56 and 57 of its brief, relative to the various ways or methods by which the United States may be vested with exclusive jurisdiction over property within the State, and we are further prone to agree with the Government in its statement that each of the two methods by which the United States may become vested with exclusive jurisdiction over property in a State is subject to the further restriction that said jurisdiction will not vest by either method contrary to the desire of the United States, and that a presumed or express acceptance by the United States is necessary to the vesting of exclusive jurisdiction. We cannot, however, agree with the Government in its application of these principles to the facts of the instant case, and, in our discussion relative thereto, we will confine the same to the lines of argument advanced by the Government. We, further, do not in any way recede from our position taken in the original brief of appellant relative to this particular question, nor do we in any manner intend to discount the force of the decisions therein cited, nor the argument made relative thereto (Brief of Appellant, 33 to 41), and we again reiterate that the cases there cited and discussed, particularly that of *Ralph Sollitt & Sons Construction Co.* v. *Virginia,* (Va. 1934) 172 S. E. 290, affirmed 292 U. S. 599, and *Ohio River Contract Company* v. *Gordon,* 244 U. S. 68, sustain the view of appellant that irrespective of the jurisdiction of the United States over the lands acquired by purchase or condemnation and used in the construction of these dams, that such under the particular facts of the instant case is not sufficient cause to exempt the appellee from taxation by the State of West Virginia.

On page 57 of the Government's Brief, the proposition is urged that the Legislature of West Virginia has con-

sented to the purchase of the lands so acquired by the Government. The consent and cession statute of West Virginia is admittedly broad, and no doubt the consent of the State has been given therein to purchase lands for the particular purpose in this case, and we are prone to agree with the Government that if said purchase was for a purpose set forth in Article I, Section 8, Clause 17 of the Constitution of the United States, that the purported retention of concurrent jurisdiction by the State of West Virginia would not be applicable thereto and that the United States, by virtue and force of the constitutional provision, would *ordinarily* be expected to assume exclusive jurisdiction over the same. See *Ft. Leavenworth R. R. Co.* v. *Lowe,* 114 U. S. 525; *Surplus Trading Co.* v. *Cook,* 281 U. S. 647.

It is our view, however, that if the purchase of lands be for some purpose other than that enumerated in said Clause 17 of the Constitution, that the State of West Virginia, by virtue of its consent and cession statute, would retain concurrent jurisdiction over the same, and we respectfully submit that such is the case here.

The proposition is stated on page 62 of the Government's Brief that the property was purchased for the erection of a "needful building." Clearly, the construction and work done in this case must of necessity fall within the definition of the term "other needful buildings," as contained in said Clause 17 of the Constitution, in order for it to be said that by virtue of said constitutional provision the United States has acquired exclusive jurisdiction over the same. Does the work done, under all the facts and circumstances of this case, properly fall within that classification? We believe not, and we adhere to our views heretofore expressed (Brief of Appellant, 40 and 41). The latest expression of opinion relative to points involved here would seem to be the case of *Atkinson*

v. *State Tax Commissioner,* (Ore. 1937) 67 P. (2d) 161. The facts in that case and in the present case are very similar. There, the Government undertook the building of what is known as the Bonneville Dam Project on the Columbia River in the State of Oregon. For these purposes the Government acquired certain lands on both sides of the stream under a consent statute of that State. The Court held that the dam being built for the purpose of aiding navigation, flood control *and the development of hydro-electric power,* it was not such a structure as fell within the clause "other needful buildings," as contained in Clause 17, Section 8, Article I of the Federal Constitution. The dams in the instant case, as shown from the whole record, were undoubtedly constructed for a two-fold purpose, first, the aiding of navigation, and, second, the development of hydro-electric power, said latter function being one that can hardly be said to fall within the meaning of the clause "other needful buildings." The very manner in which the development of said hydro-electric power was had, in connection with the building of said locks and dams, and the leasing thereof by the Government to a private enterprise (Appellant's Brief, 40), seems to clearly indicate that this was a most important and integral part of the entire project. While, as has been observed, the cases relative to this particular subject are few, it is submitted that such decisions preponderate in favor of the idea that such projects as these do not fall within the clause "other needful buildings." Attention is respectfully directed to the fact that contemporaneous with the building of these dams, the Federal Power Commission, acting under and by virtue of an Act of Congress approved June 10, 1920 (41 Stat. 1063), granted to the Kanawha Valley Power Company, a private corporation, the right to use the hydro-electric energy created by two of these dams, together with the right to construct its power plant in con-

junction with and contemporaneously with the building of said locks and dams, upon the property acquired by the Government for such purposes, and which structures form a substantial part and parcel of the entire scheme and development. (Appellant's Brief, 40, 41; R. 440-445; Appendix "F" to the Stipulation of Facts which does not appear in its entirety in the printed record, but which is a part of the original papers filed in this cause and by agreement [R. 427] is available for use by the Court and by counsel.) This license clearly shows the importance and extent of the development of hydro-electric power in connection with the building of these locks and dams, and it is respectfully submitted that taken as a whole the work involved here does not fall within the clause "other needful buildings."

On page 66 of the Government's Brief the position is taken that there has been a purchase of the property on the banks of the rivers, but not of the beds thereof. While we steadfastly contend that the property acquired by the Government on the banks of the rivers was not acquired for the purpose of erecting "other needful buildings," we are prone to agree with the Government that the acquiring of property by deed or by condemnation is a purchase under the terms of Clause 17 of the Federal Constitution, if for "needful buildings." We further agree with the Government in its view that the property rights in the beds of the Kanawha and Ohio Rivers are owned by the State of West Virginia, and cannot be said to have been "purchased," the State retaining its jurisdiction over the beds to the extent that its tax laws can fully apply to this area (Brief of Appellant, 38, 39). On page 69 of the Government's Brief, it is stated that there has been no cession of exclusive jurisdiction. We fully agree with this conclusion.

On page 70 of the Government's Brief it is stated that acceptance of exclusive jurisdiction may be presumed relative to the property here acquired. As has been heretofore stated, we agree with the view of the Government that if exclusive jurisdiction is to vest, either by consent or by cession, an acceptance, either express of presumed is also necessary, and we are fully in accord and agree with the argument of the Government relative thereto as set out fully in its brief (Pages 77-90). While we do not discount the force of or retract in any way from our previous position taken relative to this particular property, with reference to it not being acquired for "other needful buildings" (Appellant's Brief 40, 41), and from our position that the cases of *Ralph Sollitt & Sons Construction Co., supra,* and *Ohio River Contract Company* v. *Gordon, supra* (Appellant's Brief 33, 34), and *Atkinson* v. *Tax Commissioner, supra,* control in this particular case, relative to the power of the State to impose this tax, but, assuming for the sake of argument that those principles are not applicable, we respectfully submit that the facts, circumstances, method and purpose relative to the acquisition of this property, and the use to which it has been put, clearly refutes the idea or presumption that the United States has received, been vested with, or assumed exclusive jurisdiction over the lands acquired by purchase and condemnation.

The Government at each of these dam sites acquired certain lands of varying area lying within the State of West Virginia, on both sides of the river (R. 381). None of these plots of ground were of great size and it cannot be disputed from the entire record but that only a small part of the construction work was performed or ultimately placed upon such lands, a major portion of the work having been performed elsewhere and placed in the bed of the streams. A great deal of the work was carried on upon leased lands (R. 381-382), and the record and ex-

hibits referred to therein, which are part of the original papers in this cause, conclusively show that as a finished project only a small portion of the construction rests upon lands acquired by the Government for this purpose (Appendices "D," "D-1" and "E" to Stipulation of Facts). In other words, we have a situation wherein the abutments nearest the banks of the streams rest upon property acquired by the Government, while a major portion of the construction rests upon the beds of the streams. Can it reasonably be said that the Government in its wisdom would seek to exercise exclusive jurisdiction over a small part of these locks and dams, located on the banks of the streams, while at the same time admitting that it has not exclusive jurisdiction over the major portion thereof, resting in the beds of the streams? Is the Government to provide suitable or ample protection for these small parts resting upon Government acquired land, while leaving the balance or major portion thereof to the concurrent protection of the State or its subdivisions? The structures are worthless unless considered as a whole, and it would, indeed, be a peculiar situation wherein it might be claimed that over one small particular part of the locks and dams the Government has exclusive jurisdiction, while, with reference to the remainder and much greater and more important portion of the locks and dams, the Government does not have exclusive jurisdiction. Will the Government in an attempt to exercise exclusive jurisdiction over that part of the locks and dams which rests closest to the banks of the streams provide adequate police protection therefor, fire protection therefor, while leaving the major portion of the work between those two points, which portion thereof is absolutely essential and necessary to the entire work, to be policed and protected by the State authorities or its subdivisions? Certainly, this would create a most unusual situation. Can it reasonably be said that such was

the intention of the Federal Government when it acquired these lands and entered into the construction of these projects and ultimately completed the same? We believe not.

It is respectfully submitted that the Act of July 3, 1930, Chapter 847, 46 Stat. 918, 928; House Document 190, Seventieth Congress, First Session; House Document 31, Seventy-Third Congress, First Session; Act of August 30, 1935, Chapter 831, 49 Stat. 1028, 1035, do not expressly or by inference contain words or meaning indicating the least desire on the part of the United States to assume exclusive jurisdiction over this particular territory. They merely authorize and appropriate and contain no words or meaning of either a negative or affirmative character, relative to the assumption on the part of the Government of exclusive jurisdiction over said lands.

We respectfully direct the attention of the Court to other matters appearing in the printed record, and in the original papers in this cause, which to our mind indicates rather clearly that the Government at no time has entertained the thought that it would assume or exercise exclusive jurisdiction. The contract provides that the contractor shall, at its own expense, obtain all required licenses and permits (R. 66). If that portion of the property to which the Government acquired title was conceived to have been within the Government's exclusive jurisdiction, certainly the contractor could not have been required to secure any licenses or permits from the State relative to its work thereon.

The contractor was compelled to comply with the laws of the United States and of the State of West Virginia, as to the inspection of hulls, boilers and other equipment, and the licensing of masters, engineers and other members of the crews of his vessels (R. 110). Certainly,

such compliance with the laws of the State of West Virginia could not have been required with reference to work conducted upon property over which the United States conceived it had exclusive jurisdiction.

The contractor was continuously, during the construction of the locks and dams, a subscriber to the Workmen's Compensation Fund of the State of West Virginia, as required by the laws of that State (R. 347). Work upon, over or concerning the property over which the Federal Government exercised exclusive jurisdiction would of a certainty not subject the contractor to the provisions of the Workmen's Compensation Law of the State of West Virginia.

Further attention is directed to the typical deed under which the Federal Government took title to the lands acquired on the banks of the streams (R. 403). It will be observed that said deed contains four separate and distinct easements and reservations as to rights of way in favor of private corporations not concerned in or connected with the project, and which, beyond doubt, would give such private corporations the right to enter in and upon these lands in the protection, care and maintenance of their property rights thereon. Would they not have the right to expect and demand the full enjoyment and protection of the laws of the State of West Virginia with respect to their property rights? Is their property on said lands exempt from taxation or control by the State? Does not this refute the idea of exclusive jurisdiction? Had the Government so desired such jurisdiction, there can be little doubt but that it could have obtained from these private corporations their rights in, to and over said lands, but the Government did not so desire, evidencing a plain intent that it was not its purpose to acquire exclusive jurisdiction over the small plots of ground along the banks of the streams, leaving

the bulk of the work and construction to the concurrent jurisdiction of the State of West Virginia.

We again respectfully call the attention of the Court to the contract entered into between the Government and the Kanawha Valley Power Company, relative to the sale of the hydro-electric energy produced by these dams. Parts of said contract are set forth in the printed record (R. 440-445), and the whole of said contract or license, together with the exhibits therewith filed, are contained in the original papers in this cause with the stipulation of facts, as Appendix "F" thereof (R. 383). It is regretted that this entire document was not placed in the printed record, but at the time the stipulation was entered into relative to the printing of same, counsel for both appellant and appellee did not conceive that such might become so important in its entirety. However, in view of the argument advanced on the part of the Government, we feel constrained to refer to this document more fully than it appears in the printed record. As has been said, however, it is filed with the original papers in this cause, and by stipulation (R. 427), the same is available for use by the Court and by counsel.

As has been heretofore stated, this agreement between the Government, by and through the Federal Power Commission, and the Kanawha Valley Power Company, was negotiated and entered into contemporaneously with the acquisition of the sites for the construction of these locks and dams, and the construction work thereof; the work on the part of the power company in and about the erection of its power plant, etc., thereby becoming and being a necessary, integral and related part of the entire plan or scheme relative to the construction of said locks and dams. It is believed that reference to this contract and the exhibits thereto will sustain this statement fully (Appendix "F" to stipulation of facts).

Looking to this exhibit, contract or license, may we not point out a few of the provisions thereof, which would seem to somewhat conclusively rebut any presumption that the Government intended to assume exclusive jurisdiction over the plots of ground acquired by it. By Article 24 of said agreement, the licensee was bound to pay the United States certain annual charges for the use, occupancy and enjoyment of the property of the Government, and by Section (b) of Article 24 thereof, the licensee was to pay an annual charge of $32,000 for the use of the water power at the Marmet Dam and appurtenant structures owned by the United States, and for the use, occupancy and enjoyment of the lands of the United States adjoining and pertaining to said Marmet dam, and a like agreement with reference to the London dam. By subsection (b) of said Article 24, it is stated that the Federal Power Commission, an arm or instrumentality of the Federal Government, in determining the annual charge of $64,000 for the use of the two Government dams, lands and other property, *assumed* that the Power Company would be liable for certain taxes assessed by the State, and its subdivisions, and that *a like assumption* was made by the Power Company at the time it applied for its license. Therefore, had it been conceived by the Government, that upon the acquisition of these lands that it would assume exclusive jurisdiction over the same, is it consistent therewith to state in an agreement executed almost contemporaneously with said acquisition, that *it assumed* that this private corporation, using the power made possible by these dams, and using the very property so acquired, would be liable for taxation by the State and its subdivisions. The inconsistency is plain.

Article 28 of said license provides that the licensee shall abide by such reasonable regulation of services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time

to time be prescribed by any duly constituted agency of the State, which, in the case of the State of West Virginia would be its Public Service Commission. Certainly, this belies the contention that the Government ever intended or thought to assume exclusive jurisdiction over the property acquired.

The order of the Federal Power Commission filed with and made a part of said license, being the authorization of the same, states in Section 3, on page 2 thereof *"that said Marmet and London power plants are to be located, either wholly or in part, upon lands of the United States, acquired in connection with said Marmet and London navigation dams; * * *."* (Italics ours.)

We respectfully submit to the Court that the action of the Government, by and through its agency, the Federal Power Commission, in leasing to a private corporation, for profit, the right to utilize the hydro-electric energy which might be created by these locks and dams, together with the right to construct on the property acquired by the Government, its power plants, etc., and the right to use the Government property, and with the acknowledgment that said Power Company, although using and occupying lands owned by the Government, would be subject to regulation by State authorities, both as to operation and taxation, indicates most strongly that the Government, in acquiring these sites, did not intend to exercise exclusive jurisdiction over the same, but would seem clearly to indicate an intention entirely contrary thereto. Furthermore, we can conceive of no good reason why the Federal Government needs exclusive jurisdiction over these separated local areas. The dams are located in thickly populated sections of the State of West Virginia, not in some isolated spot where local protection and police powers might not be readily available, where, in order to protect the interests of the Government therein,

it might be necessary to furnish such protection wholly on the part of the Government.

We believe the authorities cited and the arguments advanced by the Government with reference to the proposition that there has been no acceptance of exclusive jurisdiction by the United States in the Washington cases, as set forth in its brief, pages 90-98, are equally applicable to the factual situation in West Virginia, and even more so.

CONCLUSION

The taxes do not impose an unconstitutional burden on the Federal Government. The State of West Virginia has consented to the purchase of the lands along the banks of the streams, but there has been no purchase with reference to the lands in the beds of the streams. This purchase, however, was not made under Clause 17, the purpose therefor not being a "needful building," hence the State has retained concurrent jurisdiction over all the lands. Even assuming that the purpose for which the lands on the banks of the streams were purchased, comes within the clause "other needful buildings," the facts and circumstances clearly indicate a desire and intention on the part of the Government not to accept exclusive jurisdiction over the same. The State, therefore, has retained its taxing jurisdiction over all the lands, both on the banks of the streams, as well as in the beds thereof.

Respectfully submitted,

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